Supreme Court, U. S.
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No. 79-1346

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK MUNOZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1979. A petition for rehearing was denied on January 22, 1980. On February 21, 1980, Mr. Justice Stewart extended the time for filing a

petition for a writ of certiorari to and including March 6, 1980. The petition was filed on March 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether the district court improperly refused to give petitioner's proposed "theory of the defense" instruction.

2. Whether the evidence was sufficient to support petitioner's conviction on the possession count of the indictment.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiracy to manufacture and distribute phencyclidine (PCP), in violation of 21 U.S.C. 846, and possession of phencyclidine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial showed that petitioner, together with co-defendants Robert J. Pesci and Kurt M. Murdzia, agreed to engage in the manufacture of PCP (III Tr. 67-82, 127). The plan was put into operation when another co-defendant, Dennis McCorquadale, obtained a can of phenylmagnesium bromide, a precursor for PCP, from an undercover DEA

agent with whom he had been dealing (II Tr. 45-47, 64-65).[1]

The actual manufacturing process took place on February 23, 1978, in Pesci's mobile home (II Tr. 72-73). At approximately 1:30 p.m. on that date, petitioner arrived at the mobile home and entered the trailer carrying a bucket of paste-like material (II Tr. 76; III Tr. 63). Co-defendant Pesci obtained some coffee filters to strain the paste petitioner had brought, and he later helped pour the phenylmagnesium bromide over the paste to make PCP (III Tr. 64). When the process was completed, Pesci testified, petitioner departed, concealing a paper bag containing PCP under his coat (II Tr. 79; III Tr. 65-66). Later that day, petitioner and Pesci were arrested in petitioner's car, which smelled strongly of chemicals (IV Tr. 86). A subsequent search of Pesci's trailer revealed a PCP laboratory in the bathroom and bedroom. A glass jar containing PCP was found in the refrigerator (II Tr. 84-87).

ARGUMENT

1. Petitioner contends (Pet. 17-23) that the district court improperly refused to give the "theory of the defense" instruction proffered by defense counsel and reproduced at pages 15-16 of the petition.

Although a defendant ordinarily is entitled to have the jury instructed regarding his theory of defense, that does not mean that the district court must give

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[1] All three of petitioner's co-defendants pled guilty prior to trial.

whatever instruction the defendant submits that purports to convey the "defense theory." See *Arnold* v. *Horrigan*, 238 F. 39 (6th Cir. 1916); *United States* v. *Wayman*, 510 F.2d 1020 (5th Cir. 1975); *United States* v. *Nevitt*, 563 F.2d 406, 409 (9th Cir. 1977). The instruction petitioner proffered in this case was highly argumentative and rambling;[2] it was in effect a summary of the defense summation, not a "theory" of the defense at all.[3]

Petitioner suffered no prejudice from the district court's failure to give his instruction verbatim, since the legal principles underlying the proffered instruction were adequately covered in the charge actually given. See *Bird* v. *United States*, 180 U.S. 356 (1901); *United States* v. *Blane*, 375 F.2d 249, 252-253 (6th Cir. 1967). Petitioner's first contention was that he was "simply in the wrong place at the wrong time and was therefore arrested and charged." The court covered this theory of defense by instructing the jury (Pet. App. 6a-7a) that

> mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish that the Defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the Defendant was a participant and not merely a knowing spectator.

[2] Jury instructions are not designed to highlight and summarize the factual assertions of the parties, and they should not be cast in an argumentative form. See *United States* v. *Campanale*, 518 F.2d 352, 362 (9th Cir. 1975); *United States* v. *Martin*, 507 F.2d 428 (7th Cir. 1974); *United States* v. *McCracken*, 488 F.2d 406, 414 (5th Cir. 1974).

[3] The district court explicitly offered to "give a short, succinct, non-argumentative theory of the case" if defense counsel would submit a revised version of his proposed instruction (Pet. App. 5a). Counsel did not do so.

Petitioner's second theory of defense was that Pesci's testimony was false and that he, petitioner, had no part in the illegal scheme. In petitioner's submission, Pesci was an unreliable witness because he was testifying for the prosecution in order to obtain a shorter sentence. In this connection, the district court instructed the jury (Pet. App. 8a):

> Consider also any relationship each witness might bear to either side of the case; the manner in which the witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in this case.
>
> Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. * * *
>
> After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

Taken as a whole, the district court's charge adequately presented petitioner's theory of defense to the jury. In light of the improper form of petitioner's proposed instruction, the district court did not abuse its discretion in refusing to give the instruction as submitted.

2. Petitioner further contends (Pet. 23-30) that the government did not present sufficient evidence to convict him of possessing PCP with intent to distribute it.[4]

Contrary to petitioner's assertion, the government introduced sufficient evidence to go to the jury on the question whether petitioner was in constructive possession of the phencyclidine in the refrigerator in the house trailer. The evidence showed that petitioner arrived at the trailer with a bucket of material that was used to produce PCP (II Tr. 76; III Tr. 63-64). He remained in the trailer for approximately two hours, during which time he helped produce the PCP (III Tr. 64). By the time petitioner left the trailer, the strong chemical odor of phenylmagnesium bromide was emanating from the mobile home and could easily be smelled in the street outside (II Tr. 80, 81). In light of this evidence, it was permissible for the jury to reject petitioner's contention that he did not know about the PCP in the trailer and to find that he did have "dominion and control" over the PCP in the refrigerator.

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[4] Petitioner received concurrent five-year sentences on the conspiracy count and the substantive count. Because the possession conviction does not entail any additional sentence, and because, under the Parole Commission's guidelines, it will not result in a lengthier term of imprisonment before eligibility for parole, this Court may properly invoke the concurrent sentence doctrine as a reason for refusing to review petitioner's challenge to the possession conviction. See *Benton* v. *Maryland*, 395 U.S. 784, 788-793 (1969); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *United States* v. *Romano*, 382 U.S. 136, 138 (1965).

Moreover, even if the direct evidence of petitioner's possession of the PCP was insufficient, his conviction on the substantive count should be sustained because possession of PCP was a reasonably foreseeable offense committed by at least one of petitioner's co-defendants in the course of and in furtherance of the conspiracy to which petitioner was a party. See *Pinkerton* v. *United States*, 328 U.S. 640, 645-648 (1946); *United States* v. *Soto*, 591 F.2d 1091, 1100 (5th Cir. 1979). Particularly in light of the vicarious liability of a co-conspirator recognized in *Pinkerton*, there is no basis for petitioner's final suggestion (Pet. 30-31) that even his conspiracy conviction should be reversed because of the alleged error in sending the substantive count to the jury. Petitioner does not challenge the sufficiency of the evidence to support the conspiracy conviction, and there was ample evidence that the PCP in the refrigerator was possessed by someone as part of the conspiracy. That is enough to justify the district court's denial of petitioner's motion for a directed verdict of acquittal on the possession count.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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